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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CALIFORNIA DEPARTMENT OF PARKS AND RECREATION et al., Petitioners, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE et al., Real Parties in Interest.	A127134 (Alameda County Super. Ct. No. RG09474549)

The California Sportfishing Protection Alliance and Public Employees for Environmental Responsibility (real parties in interest) sought a writ of mandate in the superior court to require that the California Department of Parks and Recreation and three state officials[1] (collectively State) file a report concerning waste discharge at the Carnegie State Vehicular Recreation Area with the Central Valley Regional Water Quality Control Board (Regional Board). Real parties also sought to prohibit any off-highway vehicle traffic at the recreation area until the report was filed and waste discharge issues were resolved. The superior court granted the writ.

[1] The State officials are Ruth Coleman, the Director of the Department of Parks and Recreation, Daphne Green, a Deputy Director of the Department and Robert Williamson, a district superintendent.

The State now seeks a writ of mandate in this court requesting that we vacate and set aside the superior court's order. Because real parties did not exhaust their administrative remedy before filing their petition in the superior court, we will grant the State's petition for writ of mandate.

BACKGROUND

Real parties filed a petition for writ of mandate and order to show cause in the Alameda County Superior Court. The court ordered issuance of an alternative writ of mandate that required the State (1) to submit a report to the Regional Board pursuant to Water Code section 13260 concerning waste discharge at the recreation area, and (2) to suspend all off-highway vehicle traffic at the recreation area until submission of the waste discharge report, and the State's receipt of waste discharge requirements or a waiver of such requirements from the Regional Board. Alternatively, the State could show cause before the superior court why it would not submit the waste discharge report.

The State showed cause before the superior court and demurred to the petition. Following briefing and a hearing, the court overruled the demurrer and granted the petition for a writ of mandate. The State was ordered to submit the waste discharge report and prohibit off-highway vehicle traffic as specified in the alternative writ. But on the State's motion, the superior court stayed enforcement of its order except for a provision that prohibits vehicles from driving through a portion of the recreation area known as Corral Hollow Creek. The State is "currently prohibiting and will continue to prohibit vehicles driving through Corral Hollow Creek." Although the superior court's stay was set to expire on December 28, 2009, it remains in effect by order of this court.

The State filed in this court its petition for writ of mandate and/or prohibition seeking reversal of the superior court order. We directed real parties to file their opposition to the petition and notified them in accordance with *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, that if circumstances warranted, we might issue a peremptory writ in the first instance.

The day informal briefing was to be complete, we also received a letter written on behalf of the State Water Resources Control Board and the Central Valley Regional

Water Quality Control Board arguing, inter alia, that the State's petition should be granted because real parties failed to exhaust their administrative remedies. On January 14, 2010, we directed that the Boards' letter be filed as an amicus brief and set a briefing schedule to allow the parties and Boards to further brief the exhaustion issue.

DISCUSSION

A. *Whether Administrative Exhaustion May be Considered in This Proceeding*

Before we address whether real parties were required to exhaust their administrative remedies before filing their petition in the superior court, we will address their argument that we should not consider the exhaustion issue because it was raised by amici rather than the State. Real parties rely on the general rule that courts will not consider issues raised for the first time in an amicus brief. (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274-1275.) However, application of this rule is within our discretion, especially when the issue presents a question of law based on undisputed facts and involves an important question of public policy. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 502-503.)[2] This is such a case.

The facts are not reasonably in dispute. There is no claim that real parties exhausted their administrative remedies.[3] Thus, administrative exhaustion may be a

[2] The rule cited by real parties has been uniformly applied to cases on appeal from a trial court's judgment. (See *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 711.) But we are unaware of authority applying the rule to a proceeding seeking an extraordinary writ. Writs are original proceedings in which the petitioners typically seek to have an appellate court exercise its discretion to intervene in ongoing proceedings in the superior court. Particularly in such circumstances it seems an informed discretion is more desirable than not. To paraphrase Mr. Justice Rutledge in *Wolf v. Colorado* (1949) 338 U.S. 25, 47, overruled, *Mapp v. Ohio* (1961) 367 U.S. 643, 654-656: " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes [from an uninvited source].' "

[3] Real parties' request that we take judicial notice of a September 15, 2009, letter to counsel from Jennifer Buckingham of the Department of Parks and Recreation. We grant the request. The letter however memorializes informal, prelitigation contact between the parties concerning the issues raised by real parties in their superior court

prerequisite to real party's ability to seek judicial review. This case also presents an important question of law concerning the primary jurisdiction of the water boards to enforce the statutes designed to safeguard California's water sources.

If exhaustion is required, there may be no need for judicial involvement, and when the administrative process does not resolve a dispute to the satisfaction of the parties, the administrative process may yield a clear record upon which judicial action may be taken. (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1105.) Because the integrity of the administrative process and the jurisdiction of the water boards may be undermined if courts insert themselves prematurely into the regulatory scheme, and because this case presents a legal issue based on undisputed facts, we exercise our discretion to consider whether real parties were required to exhaust their administrative remedy.

B. *Administrative Exhaustion is Required Before Seeking Judicial Review of Action Taken Under Water Code Section 13264*

The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) reflects the "primary interest [of the people] in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." (Wat. Code, § 13000.) It is intended to provide a "statewide program for the control" of our state's water resources. (*Ibid*.) The policies expressed in the Porter-Cologne Act are implemented through a statewide system of water boards. There are nine regional boards charged with the responsibility to "formulate and adopt water quality control plans" within their region. (§§ 13200, 13240.) Review of action taken by a regional board is accomplished by petition to the State Water Resources Control Board.[4] (§§ 13050, 13320.)

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petition. It is not evidence that they availed themselves of any administrative remedy, much less exhausted such remedies.

[4] Indeed, the amici in this case are the State Water Resources Control Board and the Central Valley Regional Water Quality Control Board.

Under the Porter-Cologne Act, anyone who discharges waste is required to file a report of waste discharge with the appropriate regional water board. (Wat. Code, § 13260, subd. (a).) If a report of waste discharge is not filed after the board requests one to be filed, the board may require the production of the pertinent information and assess administrative penalties, seek civil penalties, or seek injunctive relief. (§§ 13261-13262, 13267.) Remedies are also available in the case of unpermitted discharge. (§§ 13264-13265.)

Upon receipt of a report of water discharge, the regional board makes an evaluation and decides how to respond. Among its options are the issuance of waste discharge requirements (Wat. Code, § 13263, subd. (a)), enrollment under a general permit (§ 13263, subd. (i)), the issuance of a site-specific waiver (or authorization to discharge) (§ 13269, subd. (a)), enrollment under a general waiver (§ 13269, subd. (f)), and the issuance of a cleanup and abatement order. (§ 13304.)

The Porter-Cologne Act also provides that any person aggrieved by a regional water board's action or *failure to act* is entitled to administrative review, and a comprehensive set of regulations governs the review process. (Wat. Code, § 13320, subd. (a); Code of Regs, tit. 23, §§ 2050-2068.) The requirements of the petition (§ 2050), the processing of the petition (§ 2050.5), the introduction of supplemental evidence (§ 2050.6), the handling of defective petitions, including providing an opportunity to remedy the defect (§ 2051), the criteria for the issuance of stay orders (§ 2053), the provision of appropriate notice when review is undertaken on the Water Resources Control Board's own motion (§ 2055), the content of the record (§ 2064), informal dispositions (§ 2065), formal dispositions (§ 2067), and the obligation of regional boards to provide notice of the right to petition to the water board (§ 2068) are among the issues addressed.

If a petition is filed with the State Water Resources Control Board, that petition will be resolved by the board's order, by a dismissal, or dismissal by operation of law. (Code of Regs., tit. 23, § 2050.5, subd. (b).) If the board issues an order that order is subject to judicial review. (Wat. Code, § 13330, subd. (a).) If it does not modify a

regional water board's action and dismisses a petition, the regional board's decision is subject to judicial review. (§ 13330, subd. (b).)

In spite of this extensive statutory and regulatory framework, real parties argue that there is no mandatory administrative exhaustion requirement to enforce the Porter-Cologne Act. They are dismissive of the Regional Board's process for requesting an agency to take an enforcement action as "non-existent" and the State Water Resources Control Board's "discretionary procedure to review Regional Board inaction," arguing that such procedures do not afford an administrative remedy that must be exhausted. Real parties rely on *Lindelli v. Town of San Anselmo, supra,* 111 Cal.App.4th 1099 to argue that an administrative procedure may not be a mandatory prerequisite to filing suit when the administrative body is not required to accept, evaluate, and resolve disputes.

In *Lindelli,* the town awarded a waste management contract to a new service provider thereby displacing an incumbent contractor. Opponents of the new provider qualified a referendum petition to protest the award of the new contract. After the petition was certified, but before the vote on the referendum, the town solicited bids and awarded an interim contract to the new service provider. The incumbent contractor and Lindelli, one of the proponents of the referendum, protested, arguing that the town council violated Elections Code section 9241 when it awarded the interim contract. Section 9241 provides that an ordinance subject to referendum does not take effect until it is approved by the voters. When they received no response to their protest, Lindelli and the service provider sought a writ of mandate. The superior court denied the petition.

On appeal, Division Five of this court reversed the superior court and held that issuance of the interim contract to the new service provider was unlawful. (*Lindelli v. Town of San Anselmo, supra,* 111 Cal.App.4th at p. 1104.) Just as in this case, a threshold issue in *Lindelli* was whether the appellants were required to raise Elections Code section 9241 before the town council when it approved the interim contract. The *Lindelli* court observed that the only procedure available to appellants was the opportunity to participate in a public hearing. (*Ibid.*) There was no requirement that any dispute be resolved by the town council. The court reasoned that since the purpose of an

exhaustion requirement is to eliminate the need for judicial resolution of a dispute, and failing that, to provide a clear record, the exhaustion doctrine only applies where the existing administrative procedure is adequate to advance the dispute-resolution and record-building functions. (*Id.* at p. 1105.) No such function was fulfilled by the proceedings before the town council. Since a potential administrative remedy was lacking, there was no need for Lindelli and the contractor to exhaust an administrative remedy.

Amici argue this case is more like *San Elijo Ranch, Inc. v. County of San Diego* (1998) 65 Cal.App.4th 608. In *San Elijo*, the City of San Marcos and a private landowner petitioned for a writ of mandate to compel the county's compliance with landscaping requirements when it sought to expand its landfill. The court analyzed the provisions of the California Integrated Waste Management Act that are designed to establish a comprehensive program for solid waste management (Pub. Resources Code, §§ 40050 et seq.), and concluded that the act contained an extensive and relevant administrative structure, and the failure to pursue an administrative remedy would bar judicial relief. (*San Elijo Ranch, Inc., supra*, at pp. 610, 612-614.) Accordingly, the city permissibly elected to pursue a judicial remedy, but the private party had no such authority and was required to administratively exhaust before going to court. (*Id.* at p. 614.)

This case is more like *San Elijo Ranch* than *Lindelli*. The Porter-Cologne Water Quality Act and its implementing regulations contain an administrative process that is designed to resolve many issues and establish a clear record in cases where judicial intervention is necessary. Although the Regional Board never required petitioners to submit a report of discharge, real parties could have petitioned it to do so. Such a petition would have triggered an administrative process that either would have operated to resolve the issue or provide a developed record for judicial review. There is no reason to excuse real parties from exhausting the administrative remedies provided under the act.

CONCLUSION

The *Palma* procedure is appropriate "when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the

issue." (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241.) Here, given the existence of the Porter-Cologne Act's detailed administrative scheme, no purpose would be served by further briefing or oral argument.

Therefore, let a writ of mandate issue directing the Alameda County Superior Court to vacate its order overruling demurrer and granting petition for alternative writ of mandate, filed December 8, 2009, and to enter a new and different order dismissing the petition for failure to exhaust administrative remedies. In light of our determination that the administrative exhaustion requirement was not met, we will not reach the other issues raised by this petition. Upon entry of the superior court's dismissal order, our December 28, 2009, stay shall be automatically dissolved. Petitioners are entitled to their allowable costs.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.